A

DW MARGARET DAVID WILSON

v.

PERBADANAN KEMAJUAN KRAFTANGAN MALAYSIA

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
HASAN LAH JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02-1061-2006]

C

7 JANUARY 2009

CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Whether a body corporate had power to appoint solicitors to conduct or institute a legal proceeding on its behalf - Locus standi of solicitor - Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35*

D

CIVIL PROCEDURE: *Appearance - Body corporate - Whether a body corporate had power to appoint solicitors to conduct or institute a legal proceeding on its behalf - Locus standi of solicitor - Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35*

E

CIVIL PROCEDURE: *Solicitor - Locus standi - Whether solicitor had locus standi to represent a body corporate - Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35*

F

LEGAL PROFESSION: *Solicitors - Locus standi - Whether solicitor had locus standi to represent a body corporate - Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35*

G

STATUTORY INTERPRETATION: *Construction of statutes - Mandatory or directory - Use of word "may" in provision of statute - Legislative intent - Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35*

H

WORDS & PHRASES: *"may" - Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35 - Interpretation - Whether mandatory or directory*

I

At a hearing of an action in the High Court between the plaintiff, a body corporate established under the Perbadanan Kemajuan Kraftangan Malaysia Act 1979 ('Act'), and the defendant, the plaintiff's tenant, the defendant raised a preliminary objection against Messrs Zain & Co, Advocates and Solicitors, for representing the

plaintiff. The defendant argued that Messrs Zain & Co had no *locus standi* to act as solicitors for the plaintiff by virtue of s. 35 of the Act. The High Court judge was of the view that the word "may" in s. 35 of the Act is permissive and not mandatory and, therefore, held that Messrs Zain & Co had the *locus standi* to represent the plaintiff. Accordingly, he dismissed the preliminary objection raised by the defendant, resulting in the present appeal in which the single issue requiring determination was the interpretation of s. 35 of the Act.

Held (allowing the appeal with costs)
Per Raus Sharif JCA delivering the judgment of the court:

(1) Section 35 of the Act allows, notwithstanding the provisions of the Rules of the High Court 1980, a Federal Counsel authorised by the Attorney General for that purpose or any officer of the plaintiff as authorised by the Chairman or Deputy Chairman to represent the plaintiff in any civil proceedings. Although s. 35 of the Act uses the word "may" instead of the word "shall", it has been decided by high authority that when a provision in a statute uses the word "may" it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory. Having regard to the general scheme of the Act, it is quite clear that the word "may" in s. 35 of the Act must, upon a proper construction, mean "shall". Thus, the plaintiff had no power to appoint solicitors to conduct or institute a legal proceeding on its behalf. The plaintiff had to rely on the services of a Federal Counsel as authorised by the Attorney General or its officers as authorised by the Chairman or Deputy Chairman. Lembaga *Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors* (dist); *Thanimalai & The Government of Malaysia v. Lee Ngo Yew* (foll); *Kekatong Sdn Bhd v. Bank Bumiputera Malaysia Bhd* (foll). (paras 7, 12 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Di suatu perbicaraan sesuatu tindakan dalam Mahkamah Tinggi di antara plaintif, suatu badan korporat yang ditubuhkan di bawah Akta Perbadanan Kemajuan Kraftangan Malaysia 1979 ('Akta'), dan defendan, penyewa plaintif, defendan membangkitkan satu bantahan awalan terhadap Tetuan Zain & Co, Peguambela dan Peguamcara, kerana mewakili plaintif. Defendan menghujah bahawa Tetuan Zain

A & Co tidak ada *locus standi* untuk bertindak sebagai peguamcara plaintiff disebabkan s. 35 Akta. Hakim Mahkamah Tinggi berpendapat bahawa perkataan "mungkin" dalam s. 35 Akta adalah permisif dan bukan mandatori dan, oleh itu, memutuskan bahawa Tetuan Zain & Co mempunyai *locus standi* untuk mewakili plaintif.
B Oleh yang demikian, beliau menolak bantahan awalan yang dibangkitkan oleh defendan, mengakibatkan rayuan semasa di mana isu tunggal yang perlu ditentukan adalah pentafsiran s. 35 Akta.

Diputuskan (membenarkan rayuan dengan kos)
C **Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:**

(1) Seksyen 35 Akta membenarkan, meskipun peruntukan-peruntukan Kaedah-kaedah Mahkamah Tinggi 1980, seseorang Peguam Persekutuan yang diberikuasa oleh Peguam Negara untuk tujuan tersebut atau mana-mana pegawai plaintif yang
D diberikuasa oleh Pengerusi atau Penolong Pengerusi untuk mewakili plaintif dalam apa-apa prosiding sivil. Walaupun s. 35 Akta menggunakan perkataan "mungkin" dan bukan perkataan "harus", ia telah diputuskan oleh otoriti tinggi bahawa apabila
E suatu peruntukan dalam statut menggunakan perkataan "mungkin" ia merupakan persoalan niat perundangan, yang bergantung atas beberapa faktor-faktor, sama ada keputusan yang diniatkan adalah mandatori atau panduan. Memandangkan skema am Akta, ia merupakan ketara bahawa perkataan
F "mungkin" dalam s. 35 Akta mesti, atas pentafsiran betul, bermaksud "harus". Oleh itu, plaintif tidak mempunyai kuasa melantik peguamcara untuk melaksanakan atau memulakan suatu prosiding undang-undang atas pihaknya. Plaintif terpaksa bergantung pada perkhidmatan Peguam Persekutuan yang
G diberikuasa oleh Peguam Negara atau pegawai-pegawainya yang diberikuasa oleh Pengerusi atau Penolong Pengerusi. *Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors* (dibezakan); *Thanimalai & The Government of Malaysia v. Lee Ngo Yew* (diikuti); *Kekatong Sdn Bhd v. Bank Bumiputera Malaysia Bhd* (diikuti).
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Case(s) referred to:

Kekatong Sdn Bhd v. Bank Bumiputra Malaysia Bhd [1998] 2 CLJ 266 CA ***(foll)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors [2008] 8 CLJ 684 HC ***(dist)***
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Thanimalai & The Government of Malaysia v. Lee Ngo Yew [1974] 1 LNS 177 FC ***(foll)***

Legislation referred to:
Employees Provident Fund Act 1991, ss. 14(3), 67
Government Proceedings Ordinance 1956, s. 17
Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35
Rules of the High Court 1980, O. 5 r. 6(2), O. 12 r. 1(2)

For the appellant - Dato' R Kamalanathan (Vinod R Kamalanathan with him); M/s Vinod Kamalanathan & Assocs
For the respondent - Amer Hamzah Arshad (Rabini Muru Ghesan with him); M/s Zain & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S5-22-285-2003]

Reported by Suresh Nathan

JUDGMENT

Raus Sharif JCA:

[1] The plaintiff is a body corporate established under the Perbadanan Kemajuan Kraftangan Malaysia Act 1979 ("the Act"). The defendant is the plaintiff's tenant. On 4 March 2005 the appellant obtained a judgment against the defendant. It was ordered *inter alia* that the defendant deliver vacant possession of the premises that the defendant was renting to the plaintiff within 30 days from the date of said judgment.

[2] The defendant reacted by filling an application to set aside the said judgment. An interim stay *ex parte* order was obtained by the respondent on 5 April 2005. The defendant upon being served with the *ex parte* order filed an application to set it aside.

[3] At the hearing of both applications before the learned High Court Judge, the defendant raised a preliminary objection. The objection was against Messrs Zain & Co, Advocates and Solicitors for representing the plaintiff. The defendant argued that Messrs Zain & Co have no *locus standi* to act as solicitors for the plaintiff by virtue of s. 35 of the Act. The learned High Court Judge dismissed the objection. Hence, this appeal.

[4] We heard and allowed the appeal on 13 October 2008. We now give our reasons.

[5] The single issue that called for determination is the interpretation of s. 35 of the Act which reads as follows:

> 35. Civil proceedings
>
> Notwithstanding the provisions of any other written law:
>
> (a) any person holding the appointment of Federal Counsel and authorized by the Attorney-General for the purpose; or
>
> (b) any officer of the Perbadanan authorized by the Chairman or Deputy Chairman of the Perbadanan for the purpose,
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> may institute any civil proceedings on behalf of the Perbadanan or a subsidiary corporation and may, on behalf of the Perbadanan or a subsidiary corporation, appear in and conduct any such proceedings by or against the Perbadanan or the subsidiary corporation and make and do all appearances, acts, and applications in respect of such proceedings.

[6] The learned High Court Judge was of the view that the word "may" in s. 35 of the Act is permissive and not mandatory. Therefore, he hold that Messrs Zain & Co. has the *locus standi* to represent the plaintiff. Accordingly, he dismissed the preliminary objection raised by the defendant.

[7] With respect, we hold otherwise. The question whether the legislative intends s. 35 of the Act to be mandatory or directory must depend upon the scope and object of Act. One noticeable feature of the Act is the absence of a general provision that provide the plaintiff the power to employ or appoint solicitors to transact any business or do any act required to be done in exercise of its powers or carry of its duties under the Act. In such absence, the question is how does the plaintiff institute civil proceedings or appear in and conduct such proceedings in light of the requirement of O. 5 r. 6(2) and O. 12 r. 1(2) of the Rules of the High Court 1980 (RHC), except as expressly provided by or under any written law, a body corporate may not begin or carry on any such proceedings in the High Court otherwise than by a solicitor. The answer is found in s. 35 of the Act. Section 35 of the Act allows, notwithstanding the provisions of the RHC, a Federal Counsel authorised by the Attorney General for that purpose or any officer of the plaintiff as authorized by the Chairman or Deputy Chairman to represent the plaintiff in any civil proceedings.

[8] Thus, reading together s. 35 and other sections of the Act, it seems the intention of the legislative is clear. That is, proceedings by or against the plaintiff can only be instituted and proceeded with either by a Federal Counsel authorised by the Attorney General for that purpose or the plaintiff's officer authorised by the Chairman or Deputy Chairman.

[9] In this respect, we would like to refer to the decision of Hishamudin J in the case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors* [2008] 8 CLJ 684. In that case, a similar argument was raised. It relates to the interpretation of s. 67 of the Employees Provident Fund Act 1991 ("EPF Act") which reads:

> 67. Notwithstanding the provisions of any written law, but without prejudice to section 65, in any civil proceedings by or against the Board:
>
> (a) any person holding the appointment of a Federal Counsel and authorized by the Attorney General for the purpose; or
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> (b) any legal officer of the Board authorized in that behalf by the Chairman,
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> may, on behalf of the Board, institute, appear in and conduct such proceedings and may make and do all appearances, acts and applications in respect of such proceedings.

[10] It was similarly argued that with the above provisions, the firm of solicitors, Messrs Pathma & Co, who has filed the writ action for the Board, had no legal authority to institute the suit against the 3rd defendant. Hishamudin J, however, rejected the argument. This is because of the existence of the following provisions under the EPF Act which reads:

> 14(3) The Board may employ and pay agents, advocates and solicitors, bankers, stockbrokers, or any other persons, to transact any business or do any act required to be transacted or done in the exercise of its powers or in the carrying out of its duties or for the better carrying into effect of the purpose of this Act.

[11] In the present case, there is no equivalent provisions in the Act. Accordingly, we reject the plaintiff's argument that s. 35 of the Act gives the plaintiff an additional option when it comes to legal representation apart from appointing solicitors to represent them, the

A plaintiff has the choice and privilege of seeking the assistance of the Federal Counsel or legal officer of the plaintiff to conduct or institute a legal proceeding on its behalf. On the contrary, we are of the view that the plaintiff is restricted to use the services of the Federal Counsel as authorised by the Attorney General or its officers
B as authorised by the Chairman or Deputy Chairman.

[12] No doubt s. 35 of the Act used the word 'may' instead of the word 'shall'. But it has been decided by high authority that when a provision in a statute uses the word 'may', it is a question of
C legislative intent, dependent upon a number of factors whether the intended result is mandatory or directory. In the well known case of *Thanimalai & The Government of Malaysia v. Lee Ngo Yew* [1974] 1 LNS 177, the Federal Court has held that the word 'may' in s. 17 of the Government Proceedings Ordinance 1956 is to be construed
D to mean 'shall'. In *Kekatong Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd.* [1998] 2 CLJ 266, Gopal Sri Ram JCA speaking on the same subject matter said as follows:

> It is therefore wrong to assume as a matter of course that whenever Parliament uses the word 'may' it never means 'must'.

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[13] The same is true in the present case. Having regard to the general scheme of the Act, it is quite clear that on the proper construction of the word 'may' in s. 35 of the Act it must be construed to mean 'shall'. Thus, the plaintiff has no power to
F appoint solicitors to conduct or institute a legal proceeding on its behalf. The plaintiff has to rely on the services of a Federal Counsel as authorised by the Attorney General or its officers as authorised by the Chairman or Deputy Chairman.

G **[14]** For the above reasons, we unanimously allowed the appeal with costs. The order of the High Court is set aside. The deposit paid to be refunded to the defendant.

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